



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2011

Mr. Mark D. Kennedy
Assistant District Attorney
Chief - Civil Division
Hays County
111 East San Antonio Street, Suite 204
San Marcos, Texas 78666

OR2011-04077

Dear Mr. Kennedy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 412093.

The Hays County District Attorney's Office (the "district attorney") received a request for information pertaining to (1) law suits filed against Hays County (the "county"), county officials, or county employees that were settled; (2) county budget line items pertaining to settlements and attorney fees; and (3) a summary of outstanding law suits filed against the county, county employees, and county officials "with sufficient identifying information and settlement amounts provided in electronic format." You state some of the requested information has been released. You claim that the remaining requested information is not subject to the Act or is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we address your assertion that portions of the requested information are records of the judiciary. The Act only applies to information that is "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body." Gov't Code § 552.002(a)(1). The Act does not apply to records

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

of the judiciary. *See id.* § 552.003(1)(B) (definition of “governmental body” under Act specifically excludes the judiciary). Information that is “collected, assembled or maintained by or for the judiciary” is not subject to the Act. *Id.* § 552.0035(a); *see also* Tex. Sup. Ct. R. 12. Consequently, records of the judiciary need not be released under the Act. *See* Attorney General Opinion DM-166 (1992). *But see Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Open Records Decision No. 646 at 4 (1996) (“function that a governmental entity performs determines whether the entity falls within the judiciary exception to the . . . Act.”). In this instance, you state the district and county clerks are the custodians of portions of the requested information. We understand you to assert this information is maintained by the district and county clerk as agents of the judiciary. Accordingly, if this information is maintained solely by the district and county clerks as agents of the judiciary, we agree it consists of records of the judiciary that are not subject to release under the Act, and need not be released in response to this request.² However, to the extent a copy of the information at issue is also maintained by the district attorney, it is subject to the Act and we will address your arguments for this information.

Next, we understand you to assert the district attorney does not maintain information responsive to category three, listed above, in the format specified by the requestor. The Act does not require a governmental body to produce the responsive information in the format requested, a list, or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the district attorney has done so.

We will now address your claim under section 552.107(1) of the Government Code for Exhibit B. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal

²We note that records of the judiciary may be public under other sources of law. *See* Gov’t Code §§ 29.007(d)(4) (complaints filed with municipal court clerk), .007(f) (municipal court clerks shall perform duties prescribed by law for county court clerk); Loc. Gov’t Code § 191.006 (records belonging to the office of county clerk shall be open to public unless access restricted by law or court order); *see also Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with courts are generally considered public and must be released); Attorney General Opinions DM-166 (1992) at 2-3 (public has general right to inspect and copy judicial records), H-826 (1976); Open Records Decision No. 25 (1974).

services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. See *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain Exhibit B consists of a matrix of pending and recently resolved civil claims against the county. You represent the matrix was created by the district attorney to use in providing legal services to the county Commissioners Court during executive sessions. We understand you to assert the matrix constitutes a privileged attorney-client communication between the district attorney, the county Commissioners Court, and outside counsel for the county. You state the matrix was communicated in confidence and has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit B. Accordingly, the district attorney may withhold Exhibit B under section 552.107 of the Government Code.

We next address your claim under section 552.103 of the Government Code for Exhibit C. Section 552.103 provides as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Exhibit C demonstrates, on its face, that a lawsuit styled *Kevin Ficke v. Tommy Ratliff, Hays County Sheriff's Department, Hays County District Attorney's Office, and Sherri Tibbe* was pending in 428th Judicial District Court of Hays County, Texas prior to the district attorney's receipt of this request. Accordingly, we find that litigation was pending when the district attorney received this request for information and that Exhibit C relates to the pending litigation.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We note Exhibit C consists of a communication authored and sent by the opposing party in the pending litigation. Thus, the opposing party has seen or had access to Exhibit C. Therefore, the district attorney may not withhold Exhibit C under section 552.103 of the Government Code.

We note portions of Exhibit C are subject to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of public employee's resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy is confined to information that reveals "intimate details of a highly personal nature"). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district attorney must withhold the information we have marked in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Exhibit C also contains information that may be subject to section 552.1175 of the Government Code. Section 552.1175 provides in pertinent part:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

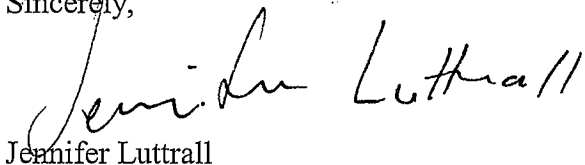
Gov't Code § 552.1175(b). We have marked the information in Exhibit C that may be subject to section 552.1175. If the individual whose information we have marked is currently a peace officer and elects to restrict access to the marked information in accordance with section 552.1175(b) of the Government Code, the district attorney must withhold this information under section 552.1175. If the individual at issue is not currently a peace officer or does not elect to restrict access to the marked information, it may not be withheld on the basis of section 552.1175.

In summary, to the extent the requested information is maintained solely by the district and county clerks as agents of the judiciary, this information consists of records of the judiciary that are not subject to release under the Act, and need not be released in response to this request. The district attorney may withhold Exhibit B under section 552.107(1) of the Government Code. The district attorney must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual whose information we have marked in Exhibit C is currently a peace officer and elects to restrict access to the marked information in accordance with section 552.1175(b) of the Government Code, the district attorney must withhold this information under section 552.1175 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 412093

Enc. Submitted documents

c: Requestor
(w/o enclosures)